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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 72

HENRY J. BEAL, COUNTY ATTORNEY OF DOUGLAS COUNTY, NEBRASKA, ET AL., PETITIONERS,

vs.

MISSOURI PACIFIC RAILROAD CORPORATION IN NEBRASKA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 9, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.

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[fol. a] [Captions omitted.]

[fol. 1]

IN UNITED STATES DISTRICT COURT, DISTRICT OF NEBRASKA, OMAHA DIVISION

No. 1226. Equity

MISSOURI PACIFIC RAILROAD CORPORATION IN NEBRASKA, Plaintiff,

vs.

HENRY J. BEAL, County Attorney of Douglas County, Nebraska; M. L. Andres, State Sheriff of Nebraska; John J. Pszanowski, Chief of Police of the City of Omaha, Nebraska; Charles B. McDonald, Sheriff of Douglas County, Nebraska; Harry Mundell, Sheriff of Sarpy County; Ed W. Phingan, Sheriff of Cass County; Carl Ryder, Sheriff of Otoe County; J. C. Broady, Sheriff of Nemaha County; Lewis W. Davies, Sheriff of Richardson County, and C. A. Sorensen, Attorney General of Nebraska; Charles A. Randall, John J. Miller and Hugh Drake, Members of the Nebraska State Railway Commission of the State of Nebraska, Defendants.

PETITION—Filed October 26, 1932

To the Honorable Judge of the District Court of the United States for the District of Nebraska:

For cause of action against the Defendants, Plaintiff alleges—

[fol. 2] I

Plaintiff is a corporation, organized and existing under and by virtue of the laws of the State of Delaware and is now, and, at all times hereinafter referred to, was a resident and citizen of the State of Delaware.

Plaintiff's business is that of a Common Carrier of passengers and freight for hire, and Plaintiff is now, and, at all times hereinafter referred to, was engaged in the transportation of passengers and freight for hire in interstate commerce.

The Defendant, Henry J. Beal, is the duly elected, qualified and acting County Attorney of Douglas County, Nebraska; the Defendant, M. L. Endres, is the duly appointed, qualified and acting State Sheriff of Nebraska; the Defendant, John J. Pszanowski, is the duly appointed, qualified and acting Chief of Police of the City of Omaha, Nebraska; the Defendant, Charles B. McDonald is the duly elected, qualified and acting Sheriff of Douglas County, Nebraska; the Defendant, Harry Mundell, is the duly elected, qualified and acting Sheriff of Sarpy County, Nebraska, the Defendant, Ed. W. Phingan, is the duly elected, qualified and acting Sheriff of Cass County, Nebraska; the Defendant, Carl Ryder, is the duly elected, qualified and acting Sheriff of Otoe County, Nebraska; the Defendant, J. C. Broady, is the duly elected, qualified and acting Sheriff of Nemaha County, the Defendant, Lewis W. Davies, is the duly elected, qualified and acting Sheriff of Richardson County, Nebraska; the defendant, C. A. Sorensen, is the duly elected, qualified and acting Attorney General of Nebraska.

The afore named Defendants are the law enforcement officers for their respectively indicated jurisdictions.

The Defendants, Charles A. Randall, John H. Miller and Hugh Drake are the duly elected, qualified and acting members of the Nebraska State Railway Commission having jurisdiction in the State of Nebraska over the rates, service and general control of Common Carriers.

Each and all of the Defendants are residents and citizens of the State of Nebraska.

[fol. 3] II

This is a civil suit in equity, involving an amount of money, exclusive of interest and costs, exceeding the sum of $3,000.00.

This suit presents and constitutes a controversy wholly between the Plaintiff, a resident and citizen of the State of Delaware, on the one side, and the Defendants, all of whom are residents and citizens of the State of Nebraska, on the other side.

The cause of action herein stated arises under the Constitution of the United States, particularly Article I, Section 8 thereof, which vests in the Congress of the United States jurisdiction "to regulate commerce * * * among

the several states * * *." and Section 1 of the [the] Fourteenth Amendment thereof, providing that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

III

The Nebraska Legislature, in 1909, enacted House Roll No. 374 (Chapter 98 of the Session Laws of Nebraska for 1909—General Section 74-519 of the Compiled Statutes of Nebraska for 1929), which provides as follows—

"It shall be unlawful for any railroad company doing business in the State of Nebraska to operate or run over its road or any part thereof, or suffer or permit to be run over its road or any part thereof, outside of the yard limits, any passenger, mail or express train carrying passengers, whose regular equipment consists of more than five cars, with a crew, consisting of less than one engineer, one fireman, one conductor, one brakeman and one flagman; and further provided, passenger trains whose regular equipment consists of five cars or less, may be operated with a crew consisting of one engineer, one fireman, one conductor and one brakeman or flagman. (1909 p. 405; Ann. 1066x8; Comp. 4690s1; R. S. 1913, 5991; C. S. 1922, 5336.)"

[fol. 4] This Statute, as indicated, requires, under the conditions specified, the participation in the operation of the train of certain qualified train operatives, but does not assume to specify what titles or designations the said train operatives shall carry on the records of their employers.

As hereinafter particularly detailed, the Defendants contemplate and threaten to wrongfully and unlawfully so administer the afore quoted Statute as to impose on Plaintiff illegal financial burdens and exactions, and occasion a disruption and disorganization of part of Plaintiff's passenger train operations.

IV

On April 3, 1928, one J. F. Moredick, acting as the duly elected and acting Chairman of the Nebraska State Legis-

lative Board of the Brotherhood of Railroad Trainmen, an organization of white railroad brakemen, filed a complaint before the Nebraska State Railway Commission charging Plaintiff with operating its passenger trains Numbers 109 and 110 in violation of the afore quoted Statute, in that the requirement of one brakeman as a member of the passenger crews was not complied with, as the trainman doing the brakeman's work was referred to by another designation. At the hearing on such complaint, the evidence disclosed that the crews operating Plaintiff's said passenger trains, consisted of one engineer, one fireman, one conductor, one flagman and one baggageman and porter, and that each member of said train crews was competent and qualified in every respect to perform the duties of his respective position, the "baggageman and porter" competently performing the duties of the brakeman; and on June 2, 1928, the said complaint was dismissed.

On January 20, 1931, said J. F. Moredick again filed a complaint before the Nebraska State Railway Commission, again alleging that for the reason above indicated, the Plaintiff operated its passenger trains, Numbers 109 and 110, in violation of the afore quoted Statute; and upon a hearing, the evidence being substantially the same, the Commission on March 1, 1932, again dismissed the complaint.

On April 8, 1932, said J. F. Moredick sought a rehearing of the said March 1, 1932 action of the Commission. A re-[fol. 5] hearing was granted, but not any additional evidence was offered by the Complainant. However, the defendant Railroad Company, the Plaintiff herein, on July 11, 1932, submitted additional evidence showing that Plaintiff's passenger trains were operated with crews consisting of one engineer, one fireman, one conductor, one flagman and one "brakeman and porter," and that each of said members of the train crews were qualified in every way to discharge the duties of their respective positions, the "brakeman and porter" competently performing the duties of the brakeman, and, when the brakeman's duties permitted, doing some porter work. All of said showing was uncontroverted. The evidence further showed that the said passenger trains had been operated in the manner described for more than a decade, and that the other railroads in Nebraska operate their passenger trains in like manner.

On October 13, 1932, the Commission entered its Order (Formal Complaint No. 682, Supplement No. 1) in the matter as follows—

"BEFORE THE NEBRASKA STATE RAILWAY COMMISSION

J. F. MOREDICK, Plaintiff,

vs.

MISSOURI PACIFIC RAILROAD CORPORATION IN NEBRASKA, Defendant

Formal Complaint No. 682. Supplement No. 1

By the Commission:

STATEMENT OF FACTS

This complaint was filed by J. F. Moredick on behalf of the Brotherhood of Railway Trainmen against the Missouri Pacific Railroad Corporation in Nebraska on January 20, 1931, alleging that the defendant was operating trains Nos. 109 and 110 without a full crew as required by law. The defendant answered that the required number of qualified men were employed on said trains but admitted that one bore the title of trainman or porter. The issues were joined on February 26, 1931, and the matter was heard on March 27, 1931. The hearing was concluded on April 10, 1932, and there being little or no dispute as to the facts, the only dispute being as to the interpretation of Section 74-519, C. S. [fol. 6] of 1929, an opinion on the questions of law involved was requested from the Commission's counsel. On receipt of this opinion the Commission did, on March 1, 1932, enter an order finding for the defendant and dismissing said Formal Complaint No. 682.

Thereafter and on April 8, 1932, the complainant filed motion for rehearing, which motion for rehearing was heard on May 20, 1932, and by order entered May 27, 1932, said motion was sustained and rehearing ordered. Said rehearing was held on July 11, 1932. At this rehearing by stipulation of the parties, the testimony adduced at the formal hearing was received and additional testimony offered. Additional testimony and the opinion of the Commission were cumulative and added no additional facts to those already adduced. Said testimony did, however, in some instances clarify the testimony given at the original hearing.

Opinion

After investigation of all the testimony, the Commission is of the opinion and so finds that so far as the safety of the traveling public is concerned, the trains in question, Nos. 109 and 110, are adequately manned, and that said trains, Nos. 109 and 110, being trains of more than five cars, are being operated by five employees qualified to perform and performing the duties of one engineer, one fireman, one conductor, one brakeman, and one flagman. The Commission finds that each one of the five railroad employees of said train performs one of the duties required by said Section 74-519, and that each employee in his particular work has passed the regular examination for said work and is fully qualified to perform the same. The Commission's attention was more particularly called to the colored trainman, performing the duties of brakeman and porter. Careful investigation discloses that although this man's race and color disqualify him from holding the position of brakeman, he is capable of performing all of these duties and has passed the same examinations required of one who bears the title of brakeman. The Commission is therefore of the opinion and so finds that so far as public safety is concerned, the trains in question are adequately manned. The Commission is, however, of the opinion that so far as a lit-
[fol. 7] eral interpretation of the statutes is concerned, trains Nos. 109 and 110 are not operated by employees bearing the titles set forth in Section 74-519, which makes the defendant company liable for criminal prosecution under Section 74-522, C. S. of 1929.

Therefore, in view of the fact that this Commission does not have any criminal jurisdiction and in view of the fact that in the Commission's opinion safety for and service to the public are adequately cared for by the crew as we find it to be constituted, the Commission finds that the proper prosecuting authorities should be advised as to the facts determined by the Commission so that prosecution may result if, in the opinion of said prosecuting authorities, a misdemeanor has been committed.

Order

It Is Therefore Ordered by the Nebraska State Railway Commission that the defendant comply fully with Section 74-519, C. S. of 1929, and that the Attorney General of the

State of Nebraska be advised that on the 20th day of January, 1931, and at other times subsequent thereto, the Missouri Pacific Railroad Corporation in Nebraska, did operate over its road in Nebraska, outside of the yard limits, a passenger train carrying passengers, whose regular equipment consisted of more than five cars with a crew consisting of one man qualified to perform and performing the duties of engineer, one man qualified to perform and performing the duties of fireman, one man qualified to perform and performing the duties of conductor, one man qualified to perform and performing the duties of brakeman, and one man qualified to perform and performing the duties of flagman, but that the man qualified to perform and performing the duties of brakeman was not designated and known as brakeman, but was designated and known as trainman.

It Is Further Ordered by the Nebraska State Railway Commission that the records and files in this case and of the Commission be and they hereby are made available to the Attorney General of the State of Nebraska for his use in prosecuting the Missouri Pacific Railroad Corporation in Nebraska for the violation of any criminal statute which he may feel that this act constitutes.

[fol. 8] Made and entered at Lincoln, Nebraska, this 13th day of October 1932.

Nebraska State Railway Commission, (Signed) C. A. Randall, Chairman. (Seal.)

Attest: (Signed) J. F. Miller, Secretary."

At all times, in pleading to the afore described Complaints, Plaintiff formally denied that the Nebraska State Railway Commission had jurisdiction over the subject matter of the Complaints, for the reason that the said passenger trains, Numbers 109 and 110, operated daily in interstate commerce between the Cities of Omaha, Nebraska, and Kansas City, Missouri, and, therefore, under Article I, Section 8 of the Constitution of the United States, the Interstate Commerce Commission had sole and exclusive jurisdiction in the premises.

The Plaintiff in its Answer to the January 20, 1931 Complaint of the said J. F. Moredick, also formally pleaded that all matters therein complained of were fully adjudicated, settled and determined by the Commission in its Order of June 2, 1928, dismissing the original like complaint of the said J. F. Moredick.

V

Upon the Nebraska State Railway Commission entering its said Order (Formal Complaint No. 682, Supplement No. 1), under date of October 13, 1932, as afore described, the Administrative and Legislative Department of the Government of the State of Nebraska, having regulatory powers over Common Carriers, had exhausted the claimed jurisdiction in the premises, and had ceased to function in connection with the said complaints of J. F. Moredick; and any possible further proceeding in the matter in Nebraska Tribunals would be judicial only.

VI

As specifically recited in the afore quoted Order of the Nebraska State Railway Commission, the Plaintiff in the conduct of its passenger trains, Numbers 109 and 110, operated and operates same with a crew consisting of one man [fol. 9] qualified to perform and performing the duties of engineer, one man qualified to perform and performing the duties of fireman, one man qualified to perform and performing the duties of conductor, one man qualified to perform and performing the duties of a flagman, one man qualified to perform and performing the duties of "brakeman and porter," thereby fully meeting all requirements and intendments of said General Section 74-519 of the Nebraska Statutes. Said trainmen were and are severally designated as engineer, fireman, conductor, flagman and "brakeman and porter," and the said Statute makes no requirement whatsoever as to how or in what manner the Railroads shall entitle their employees on the trains. In addition, a qualified baggageman-expressman handles baggage and express.

The trainmen performing the duties of "brakeman and porter" on said trains, Numbers 109 and 110, were and are colored men. Said colored men pass all examinations, mental and physical, and fulfill all other requirements, set up for the qualification of "brakemen" and "flagmen." The duties of a "brakeman and porter" consist substantively of assisting the conductor in the receiving and discharging of passengers, and, under the direction of the conductor assisting in the protecting of the train operation generally, the "brakeman and porter's" place in and about the train being at or near the middle of the train, unless particular duties call him elsewhere. When the "brakeman and por-

ter's'' brakeman duties permit, he does whatever porter work may be necessary, but this is negligible in volume, and does not include cleaning of the cars, which work is done at the terminals.

VII

Under its Contract with the Brotherhood of Railroad Trainmen, the Plaintiff refrains from literally designating the colored men doing the brakemen's work on the passenger trains, Numbers 109 and 110, as ''brakemen,'' although, as specifically recited in the afore quoted Order of the Nebraska State Railway Commission, these colored men take all of the required mental and physical examinations to qualify as brakemen, and perform satisfactorily all of the brakemen's duties.

[fol. 10] Notwithstanding the afore stated arrangement as to the designation of the colored trainmen as brakemen, brought about by the Brotherhood of Railroad Trainmen, said Brotherhood of Railroad Trainmen, through its official representative, said J. F. Moredick, caused the filing of the complaints afore described, and the purpose of the complaints was not to seek any improvement in the train service of the Plaintiff Railroad Company, but, through a purposeful arbitrary, wrongful and unlawful interpretation of and administration of said Statute 74-519, to so harass and coerce Plaintiff as to force from their positions, the colored trainmen, who, for more than a decade, have faithfully and satisfactorily performed the duties of brakemen for the Plaintiff Railroad Company. In the first hearing in this matter before the Nebraska State Railway Commission, the complainant, J. F. Moredick, testified on this aspect of the matter as follows—

''I don't know, Mr. Kirk, that this is particularly material, but I just wanted to bring it to the attention of the Commission—the fact that the B. of R. T. in our general agreements committee in St. Louis in 1921, asked the Missouri Pacific Railroad to place the porter-brakeman on the B. of R. T. Seniority list, and I am going to tell the Commission, because it isn't a matter that is secret, that the principle cause for this was to not only let the white man get some of these good jobs, but to get rid of the colored men. I think Mr. Kirk will agree.'' '' (The underscoring is the writer's.)

The object, therefore, of the complaints filed by the said J. F. Moredick, was not to better the train service of the Plaintiff Company, or to advantage in any way the People of Nebraska, but, through said arbitrary, wrongful and illegal construction of the above quoted Statute, to obtain in some tribunal a finding that, as these colored men worked under the designation, on their employers' records, of "brakemen and porter" instead of under the literal designation of "brakeman," therefore, the statutory requirement of a "brakeman" in a passenger train crew would not be complied with, notwithstanding that the colored men passed every examination, mental and physical, required of brakemen, and discharged the duties of the brakeman to [fol. 11.] the entire satisfaction of the Plaintiff Railroad Company, their employer, and to the entire satisfaction of the Nebraska State Railway Commission, the regulatory body having jurisdiction over the intrastate operation of the Plaintiff Railroad Company in Nebraska.

VIII

Under Plaintiff Company's Contract with the colored Brakemen, the wage scale of these colored brakemen is approximately $120.00 per month. But, if Plaintiff was required to hire white brakemen in the place of the colored brakemen—as is the objective of said Moredick, and the defendants herein—the wage scale under the Plaintiff's contract with the white brakemen being approximately $200.00 per month, and the number of "brakemen and porters" being seven, there would be a resulting increase in the expense to the Plaintiff Company, in the operation of its passenger trains under consideration, of approximately $6,700.00 per annum. This needless expense increase would be an absolute waste of that amount of money, and an unlawful burden and unjust exaction upon Plaintiff, and upon interstate commerce, in that the services being rendered by the colored brakemen, as stated, are competent and satisfactory in every way to all interests, other than the complainant, Moredick, and his associates; and the wage scale paid to the colored brakemen is according to the mutual agreement of the said colored brakemen and the Plaintiff Company. And annual increased expense of $6,700.00 imposed on Plaintiff, and upon interstate commerce, would reflect and constitute a gross loss of at least $125,000.00.

IX

Notwithstanding all of the facts aforestated, the defendants, under a purposefully arbitrary, wrongful and unlawful construction and administration of the above quoted statute are threatening to bring criminal proceedings against the Plaintiff Railroad Company, because of the said alleged violations of said statute, and to take other steps to impose upon Plaintiff, and upon interestate commerce, the aforedescribed illegal burdens and exactions which would result from the said wrongful and unlawful [fol. 12] construction and administration of said statute, General Section 74-519 above quoted.

X

The penalty provided by the Nebraska Statute for a violation of the aforequoted statute, General Section 74-519, is set forth in General Section 74-522 of the Compiled Statutes of Nebraska for 1929, as follows—

"The officers or agents of any railroad company doing business in the State of Nebraska who shall send out [in] its road, or cause or suffer or permit to be sent out on its road, or any part thereof, outside of the yard limits, any passenger or freight train which is not manned in accordance with the provisions of this article, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars nor more than one thousand dollars for each offense and shall stand committed until such fine and costs are paid, and any railroad company in the State of Nebraska, whose officer or officers, agent or agents or any servant or servants shall be found guilty of such misdemeanor, shall be liable for any damages caused by the violation of the provisions of this article. (1909 p. 406; Ann. 10665x11; Comp. 4690s4; R. S. 1913, 5994; C. S. 1922, 5339)".

As Plaintiff Company operates trains, Numbers 109 and 110, into and out of Nebraska daily, there would be, within a year's time. 1,460 train movements which, at the maximum possible fine of $1,000.00 if a violation obtained, would represent gross fines of $1,460,000.00 per year; and, because of such excessive penalties, which the defendants unlawfully threaten to attempt to impose, the Plaintiff Rail-

road Company must seek the injunctive protection of a Court of Equity pending the determination in an orderly manner of the matter herein described.

XI

Pursuant to the said unlawful construction of said Section 74-519 of the Nebraska Statutes, and with the purpose of accomplishing a wrongful and unlawful administration of said statute, the defendants, as stated, threaten to bring criminal proceedings against the Plaintiff Railroad for each alleged violation of the said Statute, and, as there are [fol. 18] some 1400 odd passenger train movements per year, to which the said Statute is applicable, Plaintiff Railroad Company is threatened with a multiplicity of suits, which would be to its great financial detriment and harassment, and against all of which Plaintiff can be protected only through the injunctive process of this Court of Equity, and an orderly determination of the issues involved.

XII

Unless Defendants are enjoined from proceeding against the Plaintiff Company in the arbitrary, grossly unreasonable, wrongful and unlawful manner afore described, Plaintiff, in the manner aforedetailed, will be deprived of its property without due process of law, and denied the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States; and Interstate Commerce, in the manner aforedetailed, will be unlawfully and directly burdened in violation of Article 1, Section 8 of the Constitution of the United States.

XIII

As against the threatened unlawful actions of the defendants afore described, citizens of the State of Nebraska would be entitled to injunctive and permanent relief in the Equity Courts of the State of Nebraska; and Plaintiff not being a resident and citizen of the State of Nebraska, but being a resident and citizen of the State of Delaware, and the Defendants, and each of them being residents and citizens of the State of Nebraska, and the amount in controversy, exclusive of interest and costs, exceeding $3,000.00, and the cause of action stated arising under the Constitu-

tion of the United States, Plaintiff, under the rights secured to it by the Constitution of the United States, seeks in this Court like relief.

XIV

Plaintiff is without adequate remedy at law in the premises; and, unless protected by the injunctive process of this Court, will suffer great and irreparable damages for the reasons, as hereinbefore detailed, it will be subjected to innumerable, and in the aggregate, enormous fines and penalties, the recovery back of which will be impossible, [fol. 14] and because the operation of its passenger trains, particularly trains Numbers 109 and 110, between Kansas City, Missouri, and Omaha, Nebraska, will be interrupted and disorganized, with no possibility of a recovery back of the damages so suffered.

Wherefore, as Plaintiff is without adequate remedy at law, it prays—

1. That subpoenas in equity forthwith issue to the Defendants and each of them, requiring them to answer, but not under oath (answer under oath being expressly waived), the Petition of the Plaintiff herein;

2. That pending the hearing and determination of the Court as to the issuance of an Interlocutory Injunction as herein prayed, the Court issue a Restraining Order enjoining and prohibiting the Defendants, its deputies, agents and representatives, and their successors in office, through criminal proceedings, or otherwise, from attempting to enforce or administer the said General Section 74-519 of the Compiled Statutes of Nebraska for 1929, as unlawfully construed in the manner afore described and/or interfering in any way whatsoever with Plaintiff's operation of its passenger trains, particularly passenger trains No. 109 and 110, operating between Omaha, Nebraska, and Kansas City, Missouri.

3. That the Court issue its Order of Interlocutory Injunction against the Defendants and each of them, their deputies, agents and representatives and their successors in office, enjoining and restraining them from in any manner, through criminal proceedings or otherwise, attempting to so wrongfully and illegally administer or enforce Gen-

eral Section 74-519 of the Compiled Statutes of Nebraska for 1929, having to do with the crews of Railroad Passenger Trains, as to impose upon plaintiff any financial fines, burdens or exactions for alleged violations of said Statute, and from in any manner whatsoever interfering with Plaintiff's operation of its passenger trains, including its passenger trains Numbers 109 and 110, operating between Omaha, Nebraska, and Kansas City, Missouri, because of any alleged violations of said Statute.

4. That upon the final hearing, the Defendants, and each of them, their deputies, agents and representatives, and [fol. 15] their successors in office, be forever enjoined from in any manner, through criminal proceedings or otherwise, attempting to so wrongfully and illegally administer or enforce General Section 74-519 of the Compiled Statutes of Nebraska for 1929, having to do with the crews of Railroad Passenger Trains, as to impose upon Plaintiff any financial fines, burdens or exactions for alleged violations of said Statute, and from in any manner whatsoever interfering with Plaintiff's operation of its Passenger Trains, including its Passenger Trains Numbers 109 and 110, operating between Omaha, Nebraska, and Kansas City, Missouri, because of any alleged violations of said Statute.

5. Plaintiff further prays for such other and further relief as justice and equity may require.

Missouri Pacific Railroad Corporation in Nebraska,
by J. A. C. Kennedy, Its General Attorney.

Duly sworn to by J. A. C. Kennedy. Jurat omitted in printing.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANTS TO DISMISS—Filed November 17, 1933

Come now the defendants and move the court to dismiss the above-entitled suit for the reason that the facts alleged and stated in the plaintiff's petition in equity, or bill of

[fol. 16] complaint, herein are insufficient to constitute a valid cause of action in equity against the defendants.

Paul F. Good, Attorney General, W. C. Ramsey, and Edwin Vail, Assistant Attorneys General, Attorneys for the Defendants.

[File-endorsement omitted.]

IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

No. 1226. Equity

MISSOURI PACIFIC RAILROAD CORPORATION IN NEBRASKA, Plaintiff,

vs.

HENRY J. BEAL, County Attorney, of Douglas County, Nebraska, et al., Defendants

OPINION ON OVERRULING OF MOTION TO DISMISS—Filed June 30, 1936

DONOHOE, D. J.:

The plaintiff in its petition alleged diversity of citizenship, the necessary jurisdictional amount involved, and charges that the defendants are state and county officials and law enforcement officers for their respective jurisdictions, and that the defendants, members of the Nebraska Railway Commission, are the officers and Commission having jurisdiction in the State of Nebraska over rates, service and general control of common carriers. It sets forth Section 74-519 of the Compiled Statutes of Nebraska, 1929, which provides as follows:

"It shall be unlawful for any railroad company doing business in the State of Nebraska to operate or run over its road or any part thereof, or suffer or permit to be run over its road or any part thereof, outside of the yard limits, any passenger, mail or express train carrying passengers, whose regular equipment consists of more than five cars, with a crew, consisting of less than one engineer, one fireman, one conductor, one brakeman and one flagman;

and further provided, passenger trains whose regular equipment consists of five cars [of] less, may be operated with [fol. 17] a crew consisting of one engineer, one fireman, one conductor and one brakeman or flagman."

In substance, the plaintiff alleges that it has at all times complied with the terms of said statute; that certain of its trains it operates with a crew consisting of one man, qualified to perform and performing the duties of engineer; one man qualified to perform and performing the duties of fireman; one man qualified to perform and performing the duties of conductor; one man qualified to perform and performing the duties of flagman, and one man qualified to perform and performing the duties of brakeman and porter, thereby fully meeting all requirements and intendments of said statute; that the brakeman and porter on both of said trains were and are colored men that had passed all examinations, mental and physical, and that they, and each of them, fulfill all of the requirements set up for the qualification of brakemen and flagmen within the meaning of said statute; that under a contract with the Brotherhood of railway trainmen, the plaintiff refrains from literally designating the colored men on the passenger trains in question as "brakemen," although they have all the qualifications of such, and that the said Brotherhood of railway Trainmen, through its official representative, Mr. J. F. Moredick, caused the filing of complaints before the Railway Commission, the purpose of the complaints not being to seek any improvement in the train service, but through a purposeful arbitrary, wrongful and unlawful interpretation of and administration of said statute to so harass and coerce the plaintiff as to force from their positions the colored trainmen, who for more than a decade have faithfully and satisfactorily performed the duties of brakemen for the plaintiff, and that the defendants, under a purposeful arbitrary, wrongful and unlawful construction and administration of the above quoted statute, are threatening to bring criminal proceedings against the plaintiff, because of alleged violation of said statute, and to take other steps to impose upon plaintiff and upon interstate commerce illegal burdens and exactments, which would result from a wrongful and unlawful construction and administration of said statute.

[fol. 18] The foregoing constitutes a very brief summary of the allegations of the petition, which is sufficient for our

purpose now. The allegations of the petition are quite full and complete, and embrace some matters not here referred to. These allegations are admitted by the Motion to Dismiss.

In Argument, the defendants make no point on the property rights which it is charged the defendants threaten to invade, nor do they challenge the averment that the threatened action of the defendants would deprive the plaintiff of its property rights without due process of law, nor that it would deny the plaintiff equal protection of the laws in violation of the 14th Amendment of the Constitution, nor do they deny that the plaintiff is threatened with a multiplicity of suits, to its great financial detriment and harassment.

The question presented by the Motion, upon which reliance is placed, is the question as to the jurisdiction of the Court to restrain the defendants from instituting criminal proceedings, the effect of which would be to wrongfully and unlawfully administer a statute of the State so as to impose on plaintiff illegal financial burdens. The constitutionality of the statute in question is not challenged nor involved, but it is alleged, and by the Motion admitted, that the plaintiff has fully complied with the provisions of the statute.

If the defendants are acting in excess of their authority, or in abuse of their authority, and are wrongfully claiming to be enforcing a statute, while extending its terms and provisions beyond its scope, and by so doing is threatening the plaintiff with injury, then it would seem clear that the case is one warranting equitable relief, for such conduct, it would seem under the law, [would seem under the law,] would be transcending the bounds of their official authority, and the defendants would be unlawfully assuming the right to exercise the power of government in an invasion of private property rights, and in such a case, it seems to be clear, that the private rights are entitled to adequate protection by Writ of Injunction. Green vs. Louisville & I. R. Co., 244 U. S. 499. In that case, it is clearly pointed out that "a [fol. 19] valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual."

The jurisdiction of the Court in equity in such a case was upheld by the Supreme Court of the United States in Philadelphia Co. v. Stimson, 223 U. S. 605. The right of injunc-

tion was recognized and upheld by the Circuit Court of Appeals of this Eighth Circuit in the following cases: Smith vs. Tillitson, 29 Fed. (2d) 535; Davies, Sheriff, et al. vs. Mills Novelty Co., 70 Fed. (2d) 424; Royal Baking Powder Co. vs. Emerson, 270 Fed. 431; Weyman-Bruton Co. vs. Ladd, 231 Fed. 898.

Counsel for defendants charge that this instant case should be grouped in what he terms as "Group 3"—certain cases which it is contended holds in effect "that the mere allegation that a valid state statute is about to be misconstrued by the state officers charged with its enforcement, is not sufficient to confer jurisdiction upon a Court of Equity even though the usual allegations with reference to property rights are made." As heretofore stated the allegations by the Motion are admitted to be true, and for the purpose of this Motion must be so accepted, and we are unable to make the distinction contended for by defendants' counsel. In all of the cases heretofore cited, public officials were acting or threatening to act beyond their official authority, and were contending and unlawfully assuming to exercise the power of government under a misconception or misapprehension of the law. That is the case with which we are concerned now, no matter what the facts may be as unfolded hereafter by the proof.

The Motion of the defendants will therefore be overruled. An exception will be allowed, and defendants will be allowed twenty days in which to answer, if they so elect.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION TO DISMISS—June 30, 1936

In accordance with the views expressed in the Memorandum of the Court, filed herein this date, it is

[fol. 20] Ordered, by the Court, that motion of defendants to dismiss, be, and the same is hereby overruled. Exception allowed.

Further Ordered, that defendants be, and they are hereby allowed twenty (20) days from and after this date in which to answer, if they so elect.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed July 19, 1935

Come now the defendants in the above entitled cause, and for answer to the petition in equity herein filed by the plaintiff, make the following allegations, admissions and denials:

I

Admit the allegations of paragraph I of said petition, except that the defendants aver that although the defendants were law enforcement officers for their respectively indicated jurisdictions, and members of the Nebraska State Railway Commission, as in said paragraph set forth, at the time the petition was filed, certain of the defendants have been succeeded in office by others since the commencement of the action, and their successors should be made parties defendant to this action and substituted in their respective place and stead.

II

Answering the allegations of paragraph II of the petition, defendants admit that this is a civil suit brought in equity, but deny that the same involves an amount of money, exclusive of interest and costs, exceeding the sum of $3,000.00.

Admits that the suit presents a controversy between citizens of different states.

Denies that any cause of action is stated in the petition which arises under the Constitution of the United States, either under the commerce clause contained in Article I, Section 8 thereof, or under Section I of the 14th Amendment thereto, relating to due process of law and the equal protection of the laws.

[fol. 21] III

Answering the allegations of paragraph III of said petition, admit that the Nebraska legislature in 1909 enacted Chapter 98, Session Laws of Nebraska, 1909, in substance as set out in the petition; admit that the said statute requires the participation in the operation of a railroad train of certain qualified train operators, but deny that the said statute does not assume to specify what titles or designations the said train operators shall carry on the records of their employers.

Deny that the defendants contemplate and threaten to wrongfully and unlawfully so administer the said statute as to impose on the plaintiff illegal financial burdens and exactions, and occasion a disruption and disorganization of part of plaintiff's passenger train operations.

IV

Answering the allegations of paragraph IV of said petition, defendants admit that on April 3, 1928, one J. F. Moredick filed a complaint before the Nebraska State Railway Commission charging plaintiff with operating its passenger trains Nos. 109 and 110 in violation of the aforesaid statute in that the requirement of one brakeman as a member of the passenger crews was not complied with. Admit that a hearing was had upon said complaint and same was dismissed as in the petition set out; that on January 20, 1931, said Moredick again filed a similar complaint which was also dismissed, and on April 8, 1932, a rehearing was sought by said Moredick, which was granted, and at which evidence was adduced as in the petition set forth, and that on October 13, 1932, the Nebraska State Railway Commission entered its order in said proceeding in manner and form and in words and figures as in the petition set forth.

Defendants, however, aver that the Nebraska State Railway Commission did not in its order determine that there had been any violation whatsoever on the part of the plaintiff with regard to the statute aforesaid; neither did the said Nebraska State Railway Commission find that the plaintiff had been guilty of any violation or violations thereof or order that plaintiff cease and desist therefrom, [fol. 22] nor did the Nebraska State Railway Commission order that the plaintiff do any specific act or acts, or cease and desist or refrain from doing any specific act or acts; that the order of the Nebraska State Railway Commission was in substance and effect merely that the plaintiff should fully comply with the said statute according to its terms, and that its records and files be made available to the Attorney General of the State for his use in prosecuting the plaintiff for the violation of any criminal statute which he may feel that any action of the plaintiff had violated; that the action of the Nebraska State Railway Commission amounted merely to calling the facts to the attention of the Attorney General of the State for such action as his discretion might justify, and had no legal effect.

V

Answering the allegations of paragraph V of the petition, deny that the Nebraska State Railway Commission had exhausted its jurisdiction prior to the order entered on October 13, 1932, but aver that the order as of that date entered had, as aforesaid, no legal effect, and admit that any possible further proceeding in the matter in Nebraska tribunals would be judicial only.

VI

Admit that the plaintiff in the conduct of its passenger trains Nos. 109 and 110 operated and operate same with a crew consisting of one man qualified to perform and performing the duties of engineer, one man qualified and performing the duties of fireman, one man qualified to perform and performing the duties of conductor, one man qualified to perform and performing the duties of "brakeman and porter," but deny that such operation fully meets all requirements and intendments of said statute.

Admit that said trainmen were and are severally designated as engineer, fireman, conductor, flagman and "brakeman and porter," but deny that said statute makes no requirement whatsoever as to how and in what manner the railroads shall entitle their employees on the trains.

Admit that in addition a qualified baggageman-expressman handles baggage and express.

[fol. 23] Admit that the trainmen performing the duties of "brakeman and porter" on said trains Nos. 109 and 110 were and are colored men.

Admit that said colored men pass all examinations, mental and physical, and fulfill all other requirements set up for the qualification of "brakeman" and "flagman."

Admit that the duties of a "brakeman and porter" consist substantively of assisting the conductor in the receiving and discharging of passengers, and, under the direction of the conductor assisting in the protecting of the train operation generally, the "brakeman and porter's" place in and about the train being at or near the middle of the train, unless particular duties call him elsewhere.

Admit that when the "brakeman and porter's" duties permit, he does whatever porter work may be necessary, and admit that this does not include cleaning the cars, but as to whether or not such porter work is negligible in vol-

ume these defendants have no knowledge, and, therefore, deny that the same is negligible.

VII

Answering the allegations of paragraph VII of the petition, defendants admit that the colored men doing the brakemen's work on the passenger trains Nos. 109 and 110 as brakemen take all of the required mental and physical examinations to qualify as brakemen and perform [satisfactorily] all of the brakemen's duties, but as to whether or not the plaintiff refrains from designating the said colored men as brakemen by reason of any contract with the Brotherhood of Railroad Trainmen, as in the petition set out, the defendants have no knowledge and, therefore, deny the same.

Admit that the Brotherhood of Railroad Trainmen, through its then official representative J. F. Moredick, caused the filing of the said complaints before the Nebraska State Railway Commission, but aver that they have no knowledge of the purpose of said Brotherhood or of said complainant in the filing of said complaint and, therefore, deny that the purpose of said complaint was not to seek any improvement in the train service of the plaintiff's [fol. 24] railroad company, and further deny that it was the purpose of said complaint, through a purposeful, arbitrary, wrongful and unlawful interpretation of and administration of said statute to so harass and coerce plaintiff as to force from their positions the colored trainmen.

Defendants admit that complainant Moredick gave the testimony set forth in said paragraph before the Nebraska State Railway Commission, and state that they have no knowledge on the subject, and, therefore, deny all and singular the allegations of the plaintiff that the object of the complaints filed by the said J. F. Moredick was not to better the train service of the plaintiff company, or to advantage in any way the people of Nebraska, but through an arbitrary, unlawful and illegal construction of said statute to obtain in some tribunal a finding that as these colored men worked under the designation or their employer's records of "brakeman and porter" instead of under the literal designation of "brakeman," the statutory requirement of a "brakeman" in a passenger train crew would not be complied with, notwithstanding that the

colored men passed every examination, mental and physical, required of brakemen, and discharged the duties of the brakemen to the entire satisfaction of the plaintiff railroad company, their employer, and to the entire satisfaction of the Nebraska State Railway Commission, the regulatory body having jurisdiction over the intrastate operation of plaintiff railroad company in Nebraska.

Defendants further aver that whatever the object and purpose of the Brotherhood of Railroad Trainmen or its then representative, J. F. Moredick, may have been at the time of the institution of said proceedings before the Nebraska State Railway Commission, the same is entirely immaterial in the instant action, for the reason that the order entered by the Nebraska State Railway Commission founded upon said complaints of said J. F. Moredick had no legal effect whatsoever as aforesaid, and whatsoever action may be taken hereafter towards the enforcement of said statute will be taken under the construction thereof made by the Attorney General of the State and by the law enforcement officers thereof acting under his advice and direction, and without any regard whatsoever to any object and purpose which may have been contemplated or [fol. 25] entertained by said Brotherhood of Railroad Trainmen or its then representative.

VIII

Answering the allegations of paragraph VIII of said petition, admit that the plaintiff company's contracts with the colored brakemen call for a wage scale of approximately $120.00 each per month and admit that if plaintiff were required to hire white brakemen in place of the colored brakemen (which defendants deny for lack of knowledge to have been the objective of said Moredick and expressly deny to be the object of the defendants herein) the plaintiff's wage scale with the white brakemen would be approximately $200.00 each per month and admit that the number of brakemen and porters being seven, there would be a resulting increase in the expense to the plaintiff company in the operation of its passenger trains under consideration of approximately $6,700.00 per annum.

Deny that this expense would be needless or an absolute waste of that amount of money, or an unlawful burden and an unjust exaction upon the plaintiff and upon interstate

commerce; deny that the service being rendered by the colored brakemen, as stated, are competent and satisfactory in every way to all interests other than the complainant Moredick, and his associates, for the reason that the defendants have no knowledge in that behalf.

Admit that the wage scale paid to the colored brakemen is according to the mutual agreement of the colored brakemen and the plaintiff company.

Deny that an annual increased expense of $6,700.00 imposed on plaintiff would reflect and constitute a gross loss of at least $125,000.00.

IX

Answering the allegations of paragraph IX of the petition, deny that the defendants under a [purposefully], arbitrary, wrongful and unlawful construction and administration of the above quoted statute are threatening to bring criminal proceedings against the plaintiff railroad company because of said alleged violations of said statute, or to take other steps to impose upon plaintiff, or upon [fol. 26] interstate commerce, any illegal burdens and exactions which would result from a wrongful and unlawful construction and administration of said statute.

Defendants aver that the Nebraska State Railway Commission has no intention of proceeding any further in connection with any of the matters in the premises set forth, and that none of the defendant law enforcement officers, aforesaid, have any intention to, or will act in any way to harass, coerce, impede or in any wise hinder the plaintiff in the operation of its railroad trains by reason of any alleged violation of said statute, save and except under the circumstances and conditions following, to-wit:

The Attorney General of the State has under consideration the proper construction of said statute, and if it should be determined by him that it is necessary and proper so to do in order to obtain a judicial determination of the exact meaning thereof, he may cause a test suit to be instituted in the courts of the state for some one alleged violation thereof, and cause such test suit to be prosecuted to effect so that a determination of the Supreme Court of Nebraska may be had thereon; that it is not the object and purpose of the defendant Attorney General, nor will he seek by means of such test suit or action, to [inflect] financial

penalties or loss upon the defendant prior to such time as it has been finally determined by orderly procedure in the courts of the state that the plaintiff is in fact committing acts which are violative of said statute, but that the action of the Attorney General, when taken, and of the law enforcement officers who may be called upon to assist him, will be taken solely in the interests of justice and so conducted as to cause a minimum of financial expense to the plaintiff until such final determination shall be had.

X

Answering the allegations of paragraph X of the petition, the defendants admit that the penalties provided by said statute are as set forth in the petition, and that as the plaintiff company operates trains Nos. 109 and 110 into and out of Nebraska daily, making within a year's time 1460 train movements, that at the maximum possible fine of $1,000.00 for each conviction obtained this would represent gross finds of $1,460,000.00 per year, but the defendants [fol. 27] deny that they threaten to impose any such excessive penalties, and specifically deny that they intend to or would cause successive actions for penalties to be brought against the plaintiff under said statute, but aver that, as aforesaid, they have no intention of bringing any action for penalties unless and until a test action has been brought and prosecuted to final determination, which shall effectively determine plaintiff's liability in the premises.

XI

Answering the allegations of paragraph XI of said petition, the defendants deny that they intend to bring criminal proceedings against the plaintiff railroad for each alleged violation of the said statute pursuant to an unlawful construction of said Nebraska statutes, or with the purpose of accomplishing a wrongful and unlawful administration of said statute; and defendants further deny that the plaintiff is threatened with a multiplicity of suits.

XII

Answering the allegations of paragraph XII of the petition, the defendants specifically deny that the plaintiff will be deprived of its property without due process of law,

or denied equal protection of the law, or that interstate commerce will be unlawfully and directly burdened in violation of the Constitution of the United States unless defendants are enjoined from proceeding against the plaintiff company.

XIII

Answering the allegations of paragraph XIII of the petition, defendants deny that citizens of the State of Nebraska would be entitled to injunctive and permanent relief in the equity courts of the State of Nebraska as against any threatened action of the defendants, and further deny that the plaintiff not being a resident and citizen of the State of Nebraska, but being a resident and citizen of the State of Delaware, and the defendants each being residents and citizens of the State of Nebraska, that the plaintiff is entitled to relief in this court.

XIV

Answering the allegations of paragraph XIV of the petition, defendants deny that the plaintiff is without ade-
[fol. 28] quate remedy at law in the premises; deny that the plaintiff will, unless protected by injunctive process of a court, suffer great and irreparable damage; deny that it will be subjected to innumerable, and in the aggregate, enormous fines and penalties; deny that the operation of its passenger trains, particularly Trains Nos. 109 and 110 between Kansas City, Missouri and Omaha, Nebraska, will be disrupted and disorganized; and defendants further aver that if, as aforesaid, the Attorney General should determine a test suit be necessary and desirable that the same will be prosecuted in an orderly manner with as little expense to the plaintiff as it is possible to make, and for the sole purpose of determining the lawfulness of plaintiff's actions; that the defendants will not seek to interfere with the plaintiff's operation of its train or train schedules or in any way to harass or coerce the plaintiff until the final determination of said test suit.

Wherefore, having fully answered, defendants pray that plaintiff may take nothing by its petition and action as against these defendants, and each of them, but that its petition and action may be dismissed; that defendants may

recover their costs herein expended, and for all such other and further relief as justice and equity may require.

Wm. H. Wright, Attorney General, Wm. C. Ramsey, Asst. Atty. Gen'l. Edwin Vail, Asst. Atty. Gen'l. By Edwin Vail, Asst. Atty. Gen'l., Attorneys for the Defendants.

[File endorsement omitted.]

IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

No. 1226. Equity

MISSOURI PACIFIC RAILROAD CORPORATION IN NEBRASKA, Plaintiff,

vs.

HENRY J. BEAL, County Attorney, etc., et al., Defendants

DECREE—December 2, 1938

This cause came on for hearing this day and the court, after a thorough examination of the pleadings, including the answer and the admissions therein, and a review of [fol. 29] the former memorandum opinion herein filed upon the order overruling the motion to dismiss herein filed by the defendants, is of opinion and so finds that it has already found upon the only issue which would control the judgment of the court, namely; whether or not there was a misconstruction or misinterpretation of the statute by the defendants.

The court is further of opinion and so finds, that the employment of a colored brakeman, designated as a brakeman and porter, or as a brakeman-porter, or as a porter, as described in the pleadings, was in compliance with the statute in controversy, and in view of such finding the court further finds that there is nothing further to be tried upon the merits.

The court, therefore, on its own motion directed the clerk to enter a decree for a permanent injunction as prayed by the plaintiff.

As to all of the said findings and as to the entry of said decree the defendants, and each of them, except and make

known to the court their objection to the action of the court for the reason that the same is wrong in point of law.

It Is Therefore, Ordered, Adjudged And Decreed that the defendants, and each of them, and their successors in office, be and are hereby permanently enjoined from instituting and prosecuting criminal or other proceedings against the plaintiff, its officers, agents and employees or successors in title for an alleged violation of Section 74-519 of the Compiled Statutes of Nebraska for 1929, because of the fact that the said plaintiff employs as a brakeman a properly trained or qualified colored man, or men, on its passenger train, or trains, within Nebraska, designated either as a brakeman and porter, or as a brakeman-porter, or as a porter, to which decree the defendants, and each of them, except and make known to the court their objection to the action of the court for the reason that the same is wrong in point of law.

By the Court,

J. A. Donohoe, Judge.

Endorsed: Filed Dec. 2, 1938, R. C. Hoyt, Clerk.

[fols. 30-32] In United States District Court

[Title omitted]

Notice of Appeal—Filed February 21, 1939

Notice is hereby given that the defendants and their successors in office in the above entitled cause hereby appeal to the Circuit Court of Appeals for the Eighth Circuit from the decree and final judgment entered in this action on the 2nd day of December, 1938, permanently enjoining them and each of them and their successors in office, from instituting and prosecuting criminal or other proceedings against the plaintiff, its officers, agents and employees or successors in title for an alleged violation of Section 74-519 of the Compiled Statutes of Nebraska, 1929.

Walter R. Johnson, Attorney General of Nebraska; Edwin Vail, Special Assistant; H. Emerson Kokjer, Assistant Atty. Gen., Attorneys for Appellants. Address: State Capitol Building, Lincoln, Nebraska.

[File endorsement omitted.]

Bond on Appeal for $250.00 filed February 21, 1939 omitted in printing.

[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

STATEMENT OF POINTS—Filed February 21, 1939

The defendants intend to rely on appeal on the following points:

1. The Court erred in finding that the employment of a colored brakeman, designated as a brakeman and porter, or as a brakeman porter, or as a porter, as described in the pleadings, was in compliance with the provisions of Section 54-519, Compiled Statutes of Nebraska, 1929.

[fol. 34] 2. The Court erred in entering a decree permanently enjoining the defendants and each of them and their successors in office from instituting and prosecuting criminal or other proceedings against the plaintiff, its officers, agents and employees, or successors in title, for an alleged violation of Section 74-519, Compiled Statutes of Nebraska, 1929, because of the fact that the plaintiff employs as a brakeman a properly trained or qualified colored man, or men, on its passenger train, or trains, within Nebraska, designated either as a brakeman and porter, or as a brakeman-porter, or as a porter. for the following reasons:

(a) Because it does not appear that the defendants or any of them are in error in their construction of said statute, but on the contrary that the Court erred in point of law in its construction of the statute, both in its finding and in its decree.

(b) Because, assuming the defendants or any of them to be in error in their construction of the statute, even then, a decree of injunction should not have been entered in favor of the plaintiff and against the defendants, for that

(1) The statute is a valid enactment, not in conflict with any provision either of the state or the federal constitution, and equity does not afford jurisdiction to enjoin a threatened criminal prosecution, based on a valid statute, because of an alleged misconstruction of such statute by administrative state officers.

(2) To permit this suit to be entertained is to permit a suit to be prosecuted against a sovereign state by a citizen of another state in defiance of the provisions of the Eleventh Amendment to the Constitution of the United States.

Walter R. Johnson, Att'y. Gen. of Nebraska; Edwin Vail, Special Assistant; H. Emerson Kokjer, Assistant Atty. Gen., Attorneys for Appellants, Address: State Capitol Building, Lincoln, Nebraska.

[File endorsement omitted.]

[fol. 35] IN UNITED STATES DISTRICT COURT

DESIGNATION OF CONTENTS OF RECORD ON APPEAL—Filed February 21,1939

The defendants designate the following portions of the record and proceedings to be contained in the record on appeal, to-wit:

1. Petition.
2. Motion to Dismiss.
3. Opinion of the court in ruling on motion to dismiss.
4. Order overruling motion to dismiss.
5. Answer of defendant.
6. Decree of December 2, 1938, enjoining the defendants and each of them and their successors in office from instituting and prosecuting criminal or other proceedings against the plaintiff, its officers, agents and employees or successors in title for an alleged violation of Section 74-519 of the Compiled Statutes of Nebraska for 1929.

Walter R. Johnson, Attorney General of Nebraska, Edwin Vail, Special Assistant, H. Emerson Kokjer, Assistant Atty. Gen., Attorneys for Defendants.

[File endorsement omitted.]

ACCEPTANCE OF SERVICE—Filed February 21, 1939

J. A. C. Kennedy, G. L. DeLacy, & R. E. Svoboda, attorneys for the defendants in the above entitled action do hereby acknowledge receipt of a copy of the above and fore-

going designation of contents of record on appeal and accept service thereof this 21st day of February, 1939.

J. A. C. Kennedy, G. L. DeLacy, A. E. Svoboda, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 36] In United States District Court, District of Nebraska, Omaha Division

Clerk's Certificate to Transcript

I, R. C. Hoyt, Clerk of the District Court of the United States within and for the District of Nebraska, hereby certify that pursuant to the order of court and in compliance with the Designation of Contents of Record on Appeal, a copy of which is found on page 46 hereof, the foregoing record has been made, and that the same is a true and faithful transcript of the pleadings and proceedings on file and of record in said Court in the case of Missouri Pacific Railroad Corporation in Nebraska vs. Henry J. Beal, County Attorney, etc., et al., No. 1226 Equity.

I further certify that on the 21st day of February, 1939, copy of Notice of Appeal was mailed to Kennedy, Holland, DeLacy & Svoboda, attorneys for plaintiff.

Witness my hand and the seal of said Court this 29th day of March, 1939. R. C. Hoyt, Clerk, By Mary A. Mullen, Chief Deputy.

[File endorsement omitted.]

[fol. 37] Appearances of counsel omitted in printing.

[fol. 38] In United States Circuit Court of Appeals, Eighth Circuit

Order of Submission—November 6, 1939

This cause having been called for hearing in its regular order, argument was commenced by Mr. Edwin Vail for appellants, continued by Mr. G. L. DeLacy for appellee, and concluded by Mr. H. Emerson Kokjer for appellants.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein, with leave to appellee to forthwith file printed copies of Additional Authorities and Appellant to reply thereto within two days from today.

[fol. 39] IN UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT

No. 11,465—November Term, A. D. 1939

HENRY J. BEAL, County Attorney of Douglas County, Nebraska, et al., Appellants,

vs.

MISSOURI PACIFIC RAILROAD CORPORATION IN NEBRASKA, Appellee

Appeal from the District Court of the United States for the District of Nebraska

Mr. Edwin Vail, Assistant Attorney General, and Mr. H. Emerson Kokjer, Assistant Attorney General (Mr. Walter R. Johnson, Attorney General, was with them on the brief) for Appellants.

Mr. G. L. DeLacy (Mr. J. A. C. Kennedy, Mr. Yale C. Holland, Mr. E. J. Svoboda and Mr. R. E. Svoboda were with him on the brief) for Appellee.

Before Stone, Gardner and Sanborn, Circuit Judges

OPINION—January 18, 1940

GARDNER, Circuit Judge, delivered the opinion of the court.

This was a suit in equity brought by the Missouri Pacific Railroad Corporation in Nebraska, a Delaware corporation, against appellants, who include the Attorney General of the State of Nebraska and certain other law enforcing [fol. 40] officers of that state, to enjoin them from certain threatened unlawful acts in the enforcement of the Nebraska Full Train Crew Law as interpreted by such officers. It will be convenient to refer to the parties as they were designated below. Defendants moved to dismiss the suit

for want of equity, which motion was denied, whereupon they filed answer.

The Full Train Crew Law of Nebraska requires that all trains of more than five cars shall have a crew consisting of not less than one engineer, one fireman, one conductor, one brakeman and one flagman, and that the trains of less than five cars shall have a crew consisting of one engineer, one fireman, one conductor, and one brakeman or flagman. It appears from the allegations and admissions in the pleadings, that plaintiff's passenger trains No. 109 and No. 110 operate with crews consisting of "one man qualified to perform and performing the duties of engineer, one man qualified to perform and performing the duties of fireman, one man qualified to perform and performing the duties of conductor, one man qualified to perform and performing the duties of a flagman, and one man qualified to perform and performing the duties of brakeman, designated 'brakeman and porter'"; that the trainmen performing the duties of "brakeman and porter" on these trains No. 109 and No. 110 were and are colored men who have passed all examinations, mental and physical, and fulfilled all other requirements set up for the qualification of "brakeman" and "flagman"; that the duties of a "brakeman and porter" consist substantially of assisting the conductor in the receiving and discharging of passengers, and, under the direction of the conductor, assisting in protecting the train operation generally; that the "brakeman and porter's" place in and about the train is at or near the middle of the train, unless particular duties call him elsewhere; that when his duties as brakeman permit, he does whatever porter work may be necessary, but this is negligible in volume and does not include cleaning the cars, which work is done at the terminals. That in an original proceeding to enforce this Full Train Crew Law, instituted before the Railway Commission of Nebraska, to compel the Railroad Company to discharge the colored men and hire white men as brakemen, the individual instituting the proceedings testified, among other things, "that the principal cause for this was to not only let the white men get some of these good jobs, but to get rid of the colored men"; that this individual filed a complaint before the Nebraska State Rail-
[fol. 41] way Commission, charging the plaintiff Railroad Company with operating its passenger trains No. 109 and No. 110 in violation of the statute, in that the requirement of

one brakeman was not complied with, as the trainmen who did the brakeman's work was referred to by another designation; that this proceeding was dismissed by the Commission, but on January 20, 1931, the same party again filed a complaint with the Railway Commission, charging a violation of the statute, which complaint was again dismissed by the Commission on March 1, 1932, but in April, 1932, on application of this same party, a rehearing was granted. That at that hearing evidence was offered to the effect that the "brakeman and porter," and each of the members of the train crew, were qualified in every way to discharge the duties of their respective position and the "brakeman and porter" completely performed the duties of the brakeman and when the brakeman's duties permitted he did some porter work. That in its order, the State Railway Commission recited that after investigation of all the testimony, it was of the opinion, and so found, that so far as the safety of the traveling public was concerned the trains in question, No. 109 and No. 110, were adequately manned and were being operated by five employees qualified to perform and performing the duties of one engineer, one fireman, one conductor, one brakeman, and one flagman; that each one of the five employees of said trains performed regularly one of the duties required by the Full Train Crew Law, and that each employee, in his particular work, had passed the regular examination for said work and was fully qualified to perform the same; that "the Commission's attention was more particularly called to the colored trainmen, performing the duties of brakeman and porter. Careful investigation discloses that although this man's race and color disqualify him from holding the position of brakeman, he is capable of performing all of these duties and has passed the same examinations required of one who bears the title of brakeman. The Commission is therefore of the opinion and so finds that so far as public safety is concerned, the trains in question are adequately manned. The Commission is, however, of the opinion that so far as a literal interpretation of the statutes is concerned, trains Nos. 109 and 110 are not operated by employees bearing the titles set forth in Section 74-519, which makes the defendant company liable for criminal prosecution under Section 74-522, [fol. 42] C. S. of 1929. Therefore, in view of the fact that this Commission does not have any criminal jurisdiction and in view of the fact that in the Commission's opinion safety

for and service to the public are adequately cared for by the crew as we find it to be constituted, the Commission finds that the proper prosecuting authorities should be advised as to the facts determined by the Commission so that prosecution may result if, in the opinion of said prosecuting authorities, a misdemeanor has been committed." That the Commission then ordered the Railroad Company to comply with Section 74-519, C. S. of 1929 as it construed that section, and that the Attorney General be advised that the Railroad Company did and is operating passenger trains over its line in Nebraska with a properly qualified crew, except that "the man qualified to perform the duties of brakeman was not designated and known as brakeman, but was designated and known as trainman"; that the order further recites that the records and files of the Commission are made available to the Attorney General of the state for his use in prosecuting the Railroad Company for violation of the statute. That under plaintiff's contract with the colored brakemen the wage scale is $120.00 per month, but if plaintiff were required to hire white brakemen in place of the colored brakemen the wage scale under plaintiff's contract with B. of R. T., would approximate $200.00 per month, and that the substitution of white brakemen in place of the colored brakemen would result in increasing plaintiff's expense in operating its passenger trains under consideration in Nebraska, to the extent of $6,700.00 per year.

The penalty provided by the Nebraska statute for a violation of this Full Train Crew Law is a fine of not less than $100.00 nor more than $1,000.00 for each offense. During one year there would be 1460 train movements of these trains No. 109 and No. 110, which, at the maximum possible fine of $1,000.00, would represent gross fines of $1,460,000.00 per year.

Following the action of the State Railway Commission in referring the matter to the Attorney General of the State of Nebraska for prosecution, plaintiff brought this suit. The court entered decree on the allegations and admissions of the pleadings, enjoining defendants from instituting or prosecuting criminal or other proceedings against plaintiff, its officers, agents and employees for an alleged violation of Section 74-519 of the Compiled Statutes of Nebraska for 1929, because of the fact that it employed as brakeman a [fol. 43] properly trained and qualified colored man or men

on its passenger train or trains in Nebraska, designating them as "brakeman and porter," or as "brakeman-porter."

Defendants, in seeking reversal, contend that: (1) The court erred in finding that the employment of a colored brakeman designated as a brakeman and porter, or as a brakeman-porter, or as a porter, as described in the pleadings, was a compliance with the provisions of Section 74-519, Compiled Statutes of Nebraska for 1929, and in entering a decree permanently enjoining the defendants and each of them and their successors in office from instituting and prosecuting criminal or other proceedings against the plaintiff because of the fact that the plaintiff employs as a brakeman a properly trained or qualified colored man, or men, on its passenger train, or trains, designated either as a brakeman and porter, or as a brakeman-porter, or as a porter. (2) Assuming the defendants or any of them to be in error in construction of the statute, even then a degree of injunction should not have been entered in favor of the plaintiff and against the defendants, for that the statute is not assailed as in conflict with any provision either of the State or Federal Constitution and equity does not afford jurisdiction to enjoin a threatened criminal prosecution based on a valid statute because of the alleged misconstruction of such statute by administrative state officers. (3) This suit may not be entertained, as it is in reality a suit against a sovereign state by a citizen of another state and is forbidden to be brought by the provisions of the Eleventh Amendment to the Constitution of the United States.

Section 74-519, Compiled Statutes of Nebraska for 1929, commonly known as the Full Train Crew Law, so far as here pertinent, provides that,

"It shall be unlawful for any railroad company doing business in the State of Nebraska to operate or run over its road or any part thereof, or suffer or permit to be run over its road or any part thereof, outside of the yard limits, any passenger, mail or express train carrying passengers, whose regular equipment consists of more than five cars, with a crew consisting of less than one engineer, one fireman, on- conductor, one brakeman and one flagman; and further provided, passenger trains whose regular equipment consists of five cars or less, may be operated with a crew consisting of one engineer, one fireman, one conductor and one brakeman or flagman."

[fol. 44] Section 74-522, Compiled Statutes of Nebraska for 1929, prescribes the penalties for violations of the Full Train Crew Law, and these penalties have already been noted.

The statute, passed in the exercise of the State's police power, was designed to promote the safety of passengers and employees of the Railroad Company. It is the contention of plaintiff that it has fully complied with this statute, but that the enforcing officers of the state have misconstrued the statute, and that if enforced according to such misconstruction it would be an unconstitutional invasion of plaintiff's property rights. Plaintiff has equipped its trains with a full crew, complying at least numerically with the provisions of the statute. It has designated one of its crew as a "brakeman and porter," or "brakeman-porter." This man takes exactly the same examinations, mental and physical, required of white brakemen and flagmen, and the Nebraska State Railway Commission has determined, after a careful investigation, that "so far as public safety is concerned, the trains in question are adequately manned," and that "safety for and service to the public are adequately cared for by the crew." These employees do the work of brakemen to the entire satisfaction of the Railroad Company and to the entire satisfaction of the Nebraska State Railway Commission. The fact that they may do some porter work, if and when their duties as brakemen permit, is not, we think, material. Under the record they are primarily brakemen and perform all the duties of such an employee. The act, as we have observed, is a safety measure, and not one primarily in the interest of any particular employees or class of employees.

Appellants rely strongly upon the decision of the Supreme Court of Pennsylvania in Public Service Commission v. B. & O. R. Co., 260 Pa. 323, 103 Atl. 724. In that case, a dining car conductor who did not in fact perform the duties of a brakeman, but who might be required by the conductor to act as such, was held not to be a brakeman within the provisions of the act. But the evidence conclusively showed that the dining car conductor had to remain in the dining car and perform all the duties of dining car conductor and had never at any time done any of a brakeman's work nor been called upon to so act. There was confessedly in that case not a full crew as required by the statute. In the [fol. 45] instant case, however, the brakeman-porter, fully

qualified mentally and physically as a brakeman, performs all the brakeman's work on the trains, and in addition, if and when his duties as brakeman permit, also does some porter work. We think there has been a compliance with both the letter and the spirit of the act.

A court of equity has no criminal jurisdiction, and as a general rule will not grant an injunction to stay criminal or quasi-criminal proceedings. It may, however, interpose for the protection of property rights, and if the injurious acts constituting an invasion of property rights will result in irreparable injury, then the court may grant an injunction to restrain the commencement of criminal proceedings based upon an unconstitutional or otherwise invalid statute, and such injunctive relief may be granted where the threatened prosecution is based upon a misinterpretation of a valid law if, at least as so interpreted, the statute would be unconstitutional. Pennsylvania Company v. Stimson 223 U. S. 605; Greene v. Louisville & I. R. Co. 244 U. S. 499; Royal Baking Powder Co. v. Emerson (C. C. A. 8) 270 Fed. 429; Weyman-Bruton Co. v. Ladd (C. C. A. 8) 231 Fed. 898; Ross v. Goodwin (D. C., N. H.) 40 Fed. (2d) 532; Chambers v. Bachtel (C. C. A. 5) 55 Fed. (2d) 851; Stuart v. Utility Investing Corp. (C. C. A. 3) 78 Fed. (2d) 279; Truax v. Raich 239 U. S. 33; Sterling v. Constantin 287 U. S. 378.

It is urged by appellants that a court of equity is without jurisdiction because it is not claimed that the statute is unconstitutional. But the right to injunctive relief against an officer threatening wrongful acts may be invoked whether the officer is acting under an unconstitutional statute or in excess of his authority under a constitutional statute. In this case, plaintiff charges an abuse of power, and as said in Philadelphia Company v. Stimson, supra,

"In this, there is no attempt to restrain a court from trying persons charged with crime, or the grand jury from the exercise of its functions, but the injunction binds the defendant not to resort to criminal procedure to enforce illegal demands. * * * Where the officer is proceeding under an unconstitutional act, its invalidity suffices to show that he is without authority, and it is this absence of lawful power and his abuse of authority in imposing or enforcing, in the name of the state, unwarrantable exactions or restrictions, to the irreparable loss of the complainant, which is [fol. 46] the basis of the decree. Ex parte Young, 209 U. S.

p. 159, 52 L. ed. 728, 13 L. R. A. (N. S.) 932, 28 Sup. Ct. Rep. 441, 14 A. & E. Ann. Cas. 764. And a similar injury may be inflicted, and there may exist ground for equitable relief, when an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus unlawfully assuming to exercise the power of government against the individual owner, is guilty of an invasion of private property. * * * If the complainant's rights, as against the defendant, were as claimed, it was entitled to adequate protection. And, in such case, the remedy might properly embrace the restraining of unfounded prosecutions."

In Greene v. Louisville & I. R. Co., supra, the court, in discussing the power of a court of equity to grant injunction to restrain an officer from enforcing a statute, said,

"The principle is not confined to the maintenance of suits for restraining the enforcement of statutes which, as enacted by the state legislature, are in themselves unconstitutional."

An enforcement of this statute as construed by the defendants would subject the plaintiff to a multiplicity of prosecutions. There are some 1460 train movements in a single year, and the maximum possible fine is $1000.00 for each conviction, and as each train movement would be a separate offense if operated with a crew in violation of the statute, gross penalties for a single year on these two trains might aggregate nearly one and a half million dollars.

The contention that this suit was one against the State can not be sustained. As said by the Supreme Court in Philadelphia v. Stimson, supra,

"The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded."

A suit to restrain a state officer from acts violative of plaintiff's property rights to his irreparable damage, when the officer is acting in excess of the authority granted by statute, is not a suit against the State.

[fol. 47] We conclude that the court properly exercised its equitable jurisdiction in entering the decree appealed from and it is therefore Affirmed.

[fol. 48] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 11465

HENRY J. BEAL, County Attorney of Douglas County, Nebraska, M. L. Endres, State Sheriff of Nebraska, John J. Pszanowski, Chief of Police of the City of Omaha, Nebraska, Charles B. McDonald, Sheriff of Douglas County, Nebraska, Harry Mundell, Sheriff of Sarpy County, Ed. W. Thinigan, Sheriff of Cass County, Carl Ryder, Sheriff of Otoe County, J. C. Broady, Sheriff of Nemaha County, Lewis W. Davies, Sheriff of Richardson County, and C. A. Sorensen, Attorney General of Nebraska, Charles A. Randall, John J. Miller and Hugh Drake, Members of the Nebraska State Railway Commission of the State of Nebraska, and their successors in office, Appellants,

vs.

MISSOURI PACIFIC RAILROAD CORPORATION IN NEBRASKA

Appeal from the District Court of the United States for the District of Nebraska

DECREE—January 18, 1940

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Nebraska, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court, in this cause be, and the same is hereby, affirmed with costs; and that the Missouri Pacific Railroad Corporation in Nebraska have nad recover against Henry J. Beal, County Attorney of Douglas County, Nebraska, and other appellants in this Court, the sum of Twenty Dollars for its costs herein and have execution therefor.

[fol. 49] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR REHEARING—Filed February 1, 1940

Come now the appellants and present this their petition for a rehearing of the above entitled cause and in support thereof respectfully show:

[fol. 50] Respectfully and sincerely, and with the utmost vigor, we say the opinion in this case is wrong upon the facts.

Law as to Equity Jurisdiction Correctly Stated

The law controlling the case as to when a Federal Equity Court will assume jurisdiction to enjoin enforcement of a state police power statute by its duly constituted officers was probably never better stated nor more clearly summarized than by the Court, on page 10 of its opinion in this case, as follows:

"A court of equity has no criminal jurisdiction, and as a general rule will not grant an injunction to stay criminal or quasi-criminal proceedings. It may, however, interpose for the protection of property rights, and if the injurious acts constituting an invasion of property rights will result in irreparabe injury, then the court may grant an injunction to restrain the commencement of criminal proceedings based upon an unconstitutional or otherwise invalid statute, and such injunctive relief may be granted where the threatened prosecution is based uopn a misinterpretation of a valid law if, at least as so interpreted, the statute would be unconstitutional. Pennsylvania Company v. Stimson, 223 U. S. 605; Greene v. Louisville & I. R. Co., 244 U. S. 499; Royal Baking Powder Co. v. Emerson (C. C. A. 8), 270 Fed. 429; Weyman-Bruton Co. v. Ladd (C. C. A. 8), 231 Fed. 898; Ross v. Goodwin (D. C., N. H.), 40 Fed. (2d) 532; Chambers v Bachtel (C. C. A. 5), 55 Fed. (2d) 851; Stuart v. Utility Investing Corp. (C. C. A. 3), 78 Fed. (2d) 279; Truax v. Raich, 239 U. S. 33; Sterling v. Constantin, 287 U. S. 378.

"It is urged by appellants that a court of equity is without jurisdiction because it is not claimed that the statute is unconstitutional. But the right to injunctive relief against [fol. 51] an officer threatening wrongful acts may be invoked whether the officer is acting under an unconstitutional statute or in excess of his authority under a constitutional statute."

Factual Basis of the Opinion

In this case the Court based its holding that it has equity jurisdiction upon the following findings of alleged fact, quotations being from the opinion.

Line 14, page 2:

"It appears from the allegations and admissions in the pleadings, * * *."

Second line from bottom of page 5:

"That under plaintiff's contract with the colored brakemen the wage scale is $120.00 per month, but if plaintiff were required to hire white brakemen in place of the colored brakemen the wage scale under plaintiff's contract with B. of R. T., would approximate $200.00 per month, and that the substitution of white brakemen in place of the colored brakemen would result in increasing plaintiff's expense in operating its passenger trains under consideration in Nebraska, to the extent of $6700.00 per year.

"The penalty provided by the Nebraska statute for a violation of this Full Train Crew Law is a fine of not less than $100.00 nor more than $1,000.00 for each offense. During one year there would be 1460 train movements of these trains No. 109 and 110, which, at the maximum possible fine of $1,000.00 would represent gross fine of $1,460,000.00 per year."

Page 11, last paragraph:

"An enforcement of this statute as construed by the defendants would subject the plaintiff to a multiplicity of [fol. 52] prosecutions. There are some 1460 train movements in a single year, and the maximum possible fine is $1000.00 for each conviction, and as each train movement would be a separate offense if operated with a crew in violation of the statute, gross penalties for a single year on these two trains might aggregate nearly one and a half million dollars."

Without these findings the equity jurisdiction of the Court fails under the law as stated by this Court, and the opinion has no foundation.

No Basis for These Findings of Fact

There is no basis whatever for these findings unless the bare allegations of plaintiff's petition are to be accepted as facts.

Should the Court solemnly find that the Missouri River flows up hill and empties into the mountains, it would be no

more wrong than in finding that the plaintiff in this case was threatened with a multicp-icity of suits and an invasion of its property rights, from which it would suffer great and irreparable injury. We say this seriously and do not mean to be at all flippant.

This judgment was entered upon the pleadings (Transcript of Record, pp. 28 and 29). The record contains the cold undisputed facts. There is no conflict of testimony. There is no evidence to weigh and accept or reject. We cannot change the record by any legerdemain of argument, and neither can anyone else. It will always remain as it is now. By applying well-settled rules of construction of pleadings, only one right answer can be arrived at. There is not and never was a threat of a multiplicity of suits by defendants against plaintiff. There is not and never was an invasion of plaintiff's property rights, nor a threat thereof which would cause plaintiff irreparable damage.

[fol. 53] "Judgment on the Pleadings Cannot be Rendered for Plaintiff Where His Allegations Are Sufficiently Controverted or Where the Answer Sets up a Good Defense." 49 C. J. 671.

Citing:

Williams v. Green, 23 F. (2d) 706.

Walker v. Traylor Engineering, etc. Co., 12 F. (2d) 382.

Drew v. U. S. Shipping Board Emergency Fleet Corp., 275 Fed. 620.

The following excerpts from the answer of the appellants will show that all of the allegations in the plaintiff's petition upon which the equity jurisdiction of the Court could be founded are controverted. References are to pages in the transcript of record. Emphasis indicated by italics is supplied for the purpose of this petition.

Page 21, paragraph 2:

(Defendants) "Deny that the defendants contemplate and threaten to wrongfully and unlawfully so administer the said statute as to impose on the plaintiff illegal financial burdens and exactions, and occasion a disruption and disorganization of part of plaintiff's passenger train operations."

Page 25, paragraph IX:

"Answering the allegations of paragraph IX of the petition, deny that the defendants under a (purposely), arbitrary, wrongful and unlawful construction and administration of the above quoted statute are threatening to bring criminal proceedings against the plaintiff railroad company because of said alleged violations of said statute, or to take [fol. 54] other steps to impose upon plaintiff, or upon interstate commerce, any illegal burdens and exactions which would result from a wrongful and unlawful construction and administration of said statute.

"Defendants aver that the Nebraska State Railway Commission has no intention of proceeding any further in connection with any of the matters in the premises set forth, and that none of the defendant law enforcement officers, aforesaid, have any intention to, or will act in any way to harass, coerce, impede or in any wise hinder the plaintiff in the operation of its railroad trains by reason of any alleged violation of said statute, save and except under the circumstances and conditions following, to-wit:

"(fol. 35) *The Attorney General of the State has under consideration the proper construction of said statute, and if it should be determined by him that it is necessary and proper so to do in order to obtain a judicial determination of the exact meaning thereof, he may cause a test suit to be instituted in the courts of the state for some one alleged violation thereof, and cause such test suit to be prosecuted to effect so that a determination of the Supreme Court of Nebraska may be had thereon; that it is not the object and purpose of the defendant Attorney General, nor will he seek by means of such test suit or action, to (inflect) financial penalties or loss upon the defendant prior to such time as it has been finally determined by orderly procedure in the courts of the state that the plaintiff is in fact committing acts which are violative of said statute, but that the action of the Attorney General, when taken, and of the law enforcement officers who may be called upon to assist him, will be taken solely in the interests of justice and so conducted as to cause a minimum of financial expense to the plaintiff until such final determination shall be had.*"

[fol. 55] Page 27, part of paragraph X and all of paragraph XI:

"Defendants (fol. 36) deny that they threaten to impose any such excessive penalties, and specifically deny that they intend to or would cause successive actions for penalties to be brought against the plaintiff under said statute, but *aver that, as aforesaid, they have no intention of bringing any action for penalties unless and until a test action has been brought and prosecuted to final determination, which shall effectively determine plaintiff's liability in the premises.*

"Answering the allegations of paragraph XI of said petition, the defendants deny that they intend to bring criminal proceedings against the plaintiff."

Page 27, paragraph XIV:

"Answering the allegations of paragraph XIV of the petition, defendants deny that the plaintiff is without adequate remedy at law in the premises; deny that the plaintiff will, unless protected by injunctive process of a court, suffer great and irreparable damage; *deny that it will be subjected to innumerable, and in the aggregate, enormous fines and penalties;* deny that the operation of its passenger trains, particularly Trains Nos. 109 and 110 between Kansas City, Missouri and Omaha, Nebraska, will be disrupted and disorganized; and defendants *further aver that if, as aforesaid, the Attorney General should determine a test suit be necessary and desirable that the same will be prosecuted in an orderly manner with as little expense to the plaintiff as it is possible to make* and for the sole purpose of determining the lawfulness of plaintiff's actions; *that the defendants will not seek to interfere with the plaintiff's operation of its train or train schedules, or in any way to harass or coerce the plaintiff until the final determination of said test suit.*"

[fol. 56] Plaintiffs' attorneys apparently recognized this situation and the weakness of their position on account of it, and tried to bolster up their case by citing in a supplemental brief ("Additional Authorities") filed at the moment of argument herein, the case of A. T. & S. Fe Ry. Co. v. L. Prade, 2 Fed. Supp. 855. From this case they argued that the threat of multiplicity of suits and invasion of property rights was in the statute itself, and that the threats were there, even though there were no actual threats by an officer. This decision on which their argument was based was set aside by the Supreme Court of the United States

in Ex parte La Prade, 289 U. S. 444, which specifically disapproved this theory.

We do not believe the Court meant to question the sufficiency of the assignments of error to raise this jurisdictional objection, but, if the question is raised, reference is made to paragraph 5743, page 254, Hughes, Federal Practice, Jurisdiction and Procedure, the relevant part of which is herewith quoted:

"But an objection to the jurisdiction of the trial court is one that cannot be waived, and may be raised at any time, or considered by the appellate court on its own motion; hence it need not be presented by an assignment of error."

The lack of equity jurisdiction in the United States District Court from whose decree appeal is taken was clearly pointed out in appellants' brief (See Point 3 b of "Points to be Argued," page 18, and Sections II and III (b) of the Argument, pp. 38 to 41. See also as to the admissions and allegations of Answer, pp. 7 to 14, and as to findings and decree, pp. 14 and 15, contained in the Statement) and also was argued orally at bar. However, through some inadvertence, the matters we have pointed out in this petition were [fol. 57] overlooked by the Court. The Court entirely overlooked the fact that all the allegations of the bill as to property damage and multiplicity of suits were traversed by the answers, and also entirely overlooked specific allegations contained in the answer which negative the allegations as to threatened action on the part of the Attorney General and the state law enforcement officers operating under him and set out specifically just what his purposed course of action is.

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that the decree of this Court, entered on January 18, 1940, be, upon further consideration, reversed.

Respectfully submitted, Walter R. Johnson, Attorney General; H. Emerson Kokjer, Assistant Attorney General; Edwin Vail, Assistant Attorney General, Counsel for Appellants.

[fol. 58] CERTIFICATE OF COUNSEL

We, Walter R. Johnson, Attorney General of the State of Nebraska, H. Emerson Kokjer, Assistant Attorney General, and Edwin Vail, Assistant Attorney General, do

hereby certify that the foregoing petition for a rehearing of this case is presented in good faith and is believed to be meritorious and is not presented for delay.

Walter R. Johnson, Attorney General; H. Emerson Kokjer, Assistant Attorney General; Edwin Vail, Assistant Attorney General, Counsel for Appellants.

[File endorsement omitted.]

[fol. 59] In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—February 12, 1940

The petition for rehearing filed by counsel for the appellants having been considered, It is now here Ordered by this Court that the same be and it is hereby denied.

In United States Circuit Court of Appeals

Praecipe for Transcript of Record—Filed May 1, 1940

To Honorable E. E. Koch, Clerk of the United States Circuit Court of Appeals, Eighth Circuit:

Please prepare for use in connection with the petition of writ of certiorari, to be presented to the Supreme Court of the United States, a transcript of the record in this case including therein:

1. The printed record on appeal from the District Court of the United States for the District of Nebraska to the United States Circuit Court of Appeals.

2. Proceedings had on appeal in the said United States Circuit Court of Appeals in the said case.

You are respectfully requested to cause the said proceedings in the United States Circuit Court of Appeals to be [fol. 60] printed and attached to the record, and the whole certified under your hand and seal.

Respectfully submitted, Walter R. Johnson, Attorney General; H. Emerson Kokjer, Assistant Attorney General; Edwin Vail, Assistant Attorney General, Counsel for Appellants.

[File endorsement omitted.]

[fol. 61] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

CLERK'S CERTIFICATE

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Nebraska as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, prepared in accordance with the praecipe of counsel for appellants, in a certain cause in said Circuit Court of Appeals wherein Henry J. Beal, County Attorney of Douglas County, Nebraska, et al., were Appellants and the Missouri Pacific Railroad Corporation in Nebraska, was Appellee, No. 11465, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the twenty-sixth day of February, A. D. 1940, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the Judges of the District Court of the United States for the District of Nebraska.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this first day of May, A. D. 1940.

E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit. (Seal.)

[fol. 62] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 44402. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 72. Henry J. Beal, County Attorney of Douglas County, Nebraska, et al., Petitioners, vs. Missouri Pacific Railroad Corporation in Nebraska. Petition for a writ of certiorari and exhibit thereto. Filed May 9, 1940. Term No. 72, O. T., 1940.